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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIC THOMAS EMELIO,

Defendant and Appellant.

C061463

(Super.Ct.No.
MCRDCRF070006880)

Defendant Dominic Thomas Emelio pled no contest to assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1).) He was placed on probation with conditions that, among other things, he serve 180 days in county jail. After a restitution hearing, he was ordered to pay victim restitution of \$8,950.76, plus interest, for medical bills incurred by the victim as a result of the assault.

On appeal, he contends the amount of the victim restitution order is not supported by substantial evidence. We agree and will order the victim restitution order reduced to reflect the medical

expenses supported by the evidence adduced at the restitution hearing.

BACKGROUND

The factual basis for defendant's no contest plea was the report of an officer who wrote he was contacted by the victim on July 3, 2007, "regarding an assault that had occurred approximately two months prior," when defendant and a friend were involved in a botched exchange of methamphetamine for a stolen laptop computer "sometime in May." Defendant had followed the victim in his car; when the victim pulled over, defendant opened her door, pulled her out of the vehicle, punched her numerous times, and knocked her to the ground. The victim suffered a skull fracture to her left temple, a fractured forearm, a fractured wrist, and bruising to her ribs and face.

After defendant's plea, the victim submitted to the probation department "documentation of her medical expenses that she had sustained from the defendant. The . . . medical bills totaled \$5,216.74."

At the start of the hearing on the victim's restitution claim, the prosecutor announced the victim will "authenticate ten receipts for un-reimbursed medical bills that -- and by my calculations and I'm willing to be corrected on this, total \$8,950.76."¹

¹ The prosecutor twice suggested in argument that his calculation of the total expenses reflected in Exhibits 1 through 10 might need to be verified.

The victim testified she suffered serious injuries as a result of defendant's assault, for which she received medical attention and incurred bills, many of which remain unreimbursed. The victim introduced 10 documents, all of which (she testified) represented "the unreimbursed medical expenses that [she has] in this case" and which all "relate directly to the assault."

Exhibit 1, a \$1,282.78 bill from the Fairchild Medical Center, reflects services rendered on May 19, 2007, including bandages, sling, emergency room visit, splint, painkillers, and X-rays.

Exhibit 2 is a \$318 bill from the Fairchild Medical Center for services rendered May 23, 2007, including an emergency room visit.

Exhibit 3, a \$2,186.31 bill from the Fairchild Medical Center, reflects services rendered May 25, 2007, including an emergency room visit, radiology, medications, and an I.V. treatment.

Exhibit 4 is a \$1,512 bill from Shasta Regional Medical Center for services rendered June 19, 2007, including an emergency room visit. A chart of the victim's treatment on that date states she "fell out of her pickup truck one and one half months ago, right ulnar fracture. Seen at first at Yreka where it was splinted. It was casted one and one half week ago at MMC. She was referred to orthopedist but states cannot get in due to insurance problems. . . . Presents today for continued right arm pain an[d] concerns about the case. She is also complaining of pain in the ulnar aspect of her right wrist." Her "pertinent past medical history" is listed as "fracture, forearm."

Exhibit 5 is a \$396 bill from Shasta Regional Medical Center for services rendered June 8, 2008, including an emergency room visit.

Exhibit 6 is a \$194 bill from Mercy Medical Center, Redding, for an emergency room visit on June 15, 2008.

Exhibit 7 is a \$75 bill from Medical Doctors Imaging, Inc., for what appear to be X-rays taken of her forearm on June 17, 2008.

Exhibit 8 is a \$487.29 bill from Mercy Redding for an emergency room visit on July 20, 2008.

Exhibit 9 is a "Final Notice" statement from Medical Doctors Imaging, Inc., dated February 3, 2009, showing an unpaid obligation of \$117. It does not show when the services were rendered that gave rise to the charge.

Exhibit 10 is a pharmacy bill of \$11.45 for paid medication provided on August 12, 2008.

The sum of the amounts stated on Exhibits 1 through 10 is \$6,579.83.

The victim also testified her broken wrist was in a temporary cast in mid-June 2007, after which it was "reset," and she was in a cast for a total of nine months.

Defense counsel argued the prosecutor had not demonstrated that any of the bills "actually have to do with the assault" nor was there "any credible evidence that [defendant] caused these injuries." Counsel took particular issue with Exhibits 5 through 10, because they represent bills for medical services rendered a year after the assault.

The trial court ordered defendant to pay restitution to the victim in the amount of \$8,950.76.

DISCUSSION

Defendant contends the evidence does not support the victim restitution award of \$8,950.76. He asks us to limit the award to \$5,299.09, the sum of unreimbursed medical expenses incurred in 2007, the year of the assault.

Before we examine his contention, we note the standards that apply to our review of restitution awards.

"The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120), including "conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*Id.* at pp. 1120-1121.) Penal Code section 1203.1, subdivision (b) requires the court to consider whether defendant should make restitution to the victim; and subdivision (j) states: "The court may impose and require . . . [such] reasonable conditions[] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer" A sentencing court's broad discretion to impose reasonable conditions of probation "includes ordering restitution, if such a condition is *reasonably related to the crime of which the defendant was convicted* or to future criminality.

[Citations.]” (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1209, italics added.)

We review restitution orders for abuse of discretion, and we will not reverse unless the order is arbitrary or capricious. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered. “[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. . . .” (*Ibid.*) No particular kind of proof is required to support a restitution order. (Pen. Code, § 1202.4.) Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

“When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination” (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681, italics omitted, quoting *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; see also *People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

Here, the only evidence of medical expenses incurred by the victim as a result of defendant’s assault were bills or receipts represented by Exhibits 1 through 10. The sum of medical expenses

reflected in those exhibits is \$6,579.83, not \$8,950.76. The victim did not testify that she incurred any medical expenses *not* reflected in those documents; rather, her testimony indicated the exhibits represented “*the unreimbursed medical expenses that [she has] in this case.*” (Italics added.) Nor was there any other evidence in the record from which the court could reasonably have concluded the victim incurred medical expenses in addition to, or different from, those reflected in Exhibits 1 through 10.

Defendant argues there should be no reimbursement for medical expenses incurred in 2008. In his view, “it was not established by substantial evidence that the June, July and August 2008 medical bills had anything to do with the May 2007 assault. Those visits, more than one year after the incident were too far removed from the incident to be connected with it.” Expenses incurred in 2008 for (chiefly) emergency room visits, represented on Exhibits 5 through 10, add up to \$1,280.74.

We conclude the 2008 expenses were properly included in the victim restitution order. The victim testified that the medical expenses represented by the exhibits all “relate directly to the assault.”

The trial court was entitled to credit the victim’s testimony. “The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court” (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) In addition, her testimony alone suffices as substantial evidence in support of the restitution award because the testimony of a single witness is sufficient to support a judgment or finding unless the testimony is

physically impossible or its falsity is apparent without resorting to inferences or deductions. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1075; *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) To the extent defendant attempts to argue the victim's testimony is impossible or inherently false, we disagree. He has not shown that, after having suffered a fractured forearm and fractured wrist in defendant's attack, the victim could not still suffer pain or other symptoms one year later sufficient to send her to the emergency room, to seek an X-ray and to obtain prescription pain medication.

Pursuant to this court's miscellaneous order No. 2010-002, we deem defendant to have raised the issue of whether recent amendments to Penal Code section 4019 entitle him to additional presentence credits. We conclude they do not. (Pen. Code §§ 1192.7, subd. (c)(8), 4019, subd. (b)(2).)

DISPOSITION

The judgment (order of probation) is modified to provide that defendant shall pay restitution to the victim in the amount of \$6,579.83, plus interest. As so modified, the judgment is affirmed. The trial court is directed to amend its records to

reflect the modification and to forward the appropriate amended documents to defendant and to the probation department.

SCOTLAND, P. J.

We concur:

SIMS, J.

ROBIE, J.